

June 14, 2017

VIA ECF

Honorable Lorna G. Schofield
United States District Judge
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

RE: *Contant, et al. v. Bank of America Corporation, et al.*, 17-cv-3139;
Lavender, et al. v. Bank of America Corporation, et al., 17-cv-4392

Dear Judge Schofield:

Defendants respectfully request that the Court suspend the briefing schedule of the motion to dismiss in the above-captioned *Contant* case (currently due June 19), in light of the filing earlier this week of the substantially overlapping above-captioned *Lavender* case, which was filed by the same counsel for plaintiffs as *Contant*. The suspension would afford the parties an opportunity to confer about consolidation of the cases, coordination of motions to dismiss, and related matters—without continuing to work toward a briefing deadline that no longer reflects the structure of the case.

We have contacted plaintiffs' counsel who appear to agree that piecemeal briefing of the *Contant* case is no longer efficient, but would not consent to request a stay from the Court unless defendants first made concessions on a schedule and other matters. Mindful that negotiations among the parties in this case have hardly been easy in the past and that the briefing deadline is nearly upon us, defendants did not want to wait any longer to bring the issue to the Court's attention. In the meantime, defendants will continue to discuss other case management matters with the plaintiffs in the hope of presenting a consensus proposal to the Court—and will promptly update the Court on that score.

On September 26, 2016, plaintiffs' counsel filed the first "indirect" foreign exchange-related complaint in *Baker, et al. v. Bank of America Corporation*, No. 16-cv-7512. The deficiencies in the *Baker* complaint, and the bases upon which defendants would move to dismiss it should that prove necessary, were described to plaintiffs in detail in both the November 15, 2016 joint pre-trial conference letter and during the November 22, 2016 pre-trial conference; defendants ultimately did move to dismiss, on January 23, 2017, for these same reasons. In lieu of responding to defendants' motion to dismiss, on March 24, 2017, plaintiffs filed an "amended complaint" that was 40 days overdue and filed on behalf of an entirely new slate of plaintiffs. (No. 16-cv-7512, ECF No. 176.) After defendants raised concerns about the procedural propriety of that new pleading, plaintiffs voluntarily dismissed the *Baker* action and filed the *Contant* action on April 28, 2017. (No. 17-cv-3139, ECF No. 1.) The *Contant* complaint sought injunctive relief under the Sherman Act and damages under New York, California, Florida, Illinois, Minnesota, and North Carolina law.

On May 5, 2017, the Court entered a stipulated order setting forth a schedule for the motion to dismiss the *Contant* complaint, which would be due on June 19, 2017. (No. 17-cv-3139, ECF No. 17.) Later that same day, on May 5, 2017, plaintiffs' counsel sent defendants a demand letter on behalf of an individual purporting to represent a class seeking damages under Massachusetts law. Massachusetts law provides for a demand letter to be sent 30 days prior to the filing of a complaint.

Defendants then contacted plaintiffs to request that, if plaintiffs intend to add a Massachusetts claim to the *Contant* case, then the motion to dismiss schedule should be modified to allow defendants to file a single motion against all claims, thereby conserving party and judicial resources. Plaintiffs told defendants they would take their request under consideration.

Plaintiffs did not respond to defendants' request. Instead, on Saturday, June 10, 2017—approximately a week before defendants were due to file their motion to dismiss—plaintiffs' counsel filed the *Lavender* complaint. (No. 17-cv-4392, ECF No. 1.) That complaint was nearly identical to the *Contant* complaint, except that it was brought on behalf of different plaintiffs, added claims under Massachusetts and Arizona law, and omitted claims under Illinois, Minnesota, and New York law.

On Monday, June 12, 2017, plaintiffs notified defendants that plaintiffs would be “amenable to entering into a stipulation to modify the briefing schedule to allow defendants to move with respect to both [*Contant* and *Lavender*] complaints at the same time.” Later that same day, defendants asked plaintiffs to join them in requesting an immediate suspension of the *Contant* schedule so that defendants could consider their position on consolidation of the *Contant* and *Lavender* cases and related matters, without facing a briefing deadline that both sides appear to agree should be superseded. But plaintiffs declined to consent unless defendants first agreed to a proposal for consolidating the two cases and a briefing schedule.

Defendants believe that plaintiffs' conduct in these matters over the past nine months has unduly wasted party resources by causing defendants to brief *seriatim* motions to dismiss only to be interrupted by a new pleading. Nevertheless, defendants are prepared to confer with plaintiffs in good faith on the procedure for consolidating the *Contant* and *Lavender* cases and on coordinating briefing of a single motion to dismiss that would efficiently address the claims of both cases. Defendants intend to seek a scheduling order setting a deadline for a “best and final” complaint, not only on behalf of the named plaintiffs but on behalf of any “indirect” claimant or class plaintiffs' counsel anticipate representing. Defendants intend to conduct these discussions expeditiously, consistent with the fact that doing so requires coordination among sixteen different corporate families of defendants, many based abroad. At this point, however, there is no longer sound reason for defendants to also continue to expend resources on briefing that addresses the *Contant* action only—a task that both parties appear to agree should be superseded by coordinated briefing in the *Contant* and *Lavender* cases.

Accordingly, defendants respectfully request that the Court stay the briefing schedule in *Contant* to allow the parties time to discuss consolidation of the *Contant* and *Lavender* cases, a coordinated briefing schedule, and related matters. Within 10 days, defendants will update the Court on whether the parties have been able to reach agreement on these matters.

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